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Private Law: Obligations

H. Alston Johnson III

OBLIGATIONS

*H. Alston Johnson III**

SOLIDARITY

Imperfect Solidarity?

Motorcycle riding can be hazardous to the consistency of the law. This little known scientific fact was demonstrated during the last term in *Gremillion v. State Farm Mutual Automobile Insurance Co.*[1] Plaintiff wife was riding as a passenger on a motorcycle being driven by her husband, and was injured when he negligently[2] drove the cycle into a roadside ditch. The cycle was owned by the wife's father, but he carried no insurance on it.[3] The husband carried two automobile policies, but the jurisprudence appears to be[4] that a motorcycle is not included in the definition of a "non-owned automobile" being driven by an insured for liability coverage purposes. Had the husband chosen an automobile to drive rather than a motorcycle, his policies would have afforded coverage, and the wife could have brought a direct action against the insurer under well-settled jurisprudence.[5]

But he didn't, and therefore she couldn't. Thus, the wife had been injured at the hands of an uninsured motorist, who also happened to be her husband. She sued her husband's insurer under its uninsured motorist coverage, seeking recovery for her injuries up to the policy limit. Her husband joined her suit for penalties and attorney's fees for arbitrary refusal to pay his wife, a demand eventually rejected.

The insurer denied liability to the wife under the uninsured motorist clause of the policy because it had agreed to pay only those sums which the wife, as an insured, "shall be legally entitled to recover as damages from the owner or

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* Associate Professor of Law, Louisiana State University.

1. 302 So. 2d 712 (La. App. 3d Cir.), *cert. denied*, 305 So. 2d 134 (1974).

2. The husband's negligence was determined at trial and affirmed by the appellate court and does not form a part of this discussion.

3. Accordingly, the possibility of the husband's being an omnibus insured on a policy insuring the father as named insured was not present.

4. Guillory v. Deshotel, 251 So. 2d 91 (La. App. 3d Cir. 1971), *cert. denied*, 259 La. 810, 253 So. 2d 67 (1971); Labove v. Traders & General Ins. Co., 219 So. 2d 614 (La. App. 3d Cir.), *cert. denied*, 254 La. 22, 222 So. 2d 69 (1969).

5. *See, e.g.*, Edwards v. Royal Indemn. Co., 182 La. 171, 161 So. 191 (1935).

operator of an uninsured automobile."[6] The insurer argued that since the wife could not have recovered anything from her husband due to the statute creating interspousal immunity from such a suit,[7] she was not a person "legally entitled to recover" from the uninsured motorist and thus could not recover under the uninsured motorist provision. In the alternative, the insurer contended that it should be entitled to judgment on its reconventional demand against the husband for any amount which it might be compelled to pay to the wife, based upon its statutory right to recover sums expended in compensation to the wife from any person "legally responsible" for the damage.[8] To this reconventional demand the husband interposed a peremptory exception, pleading interspousal immunity. On a motion for summary judgment, the trial court rejected the insurer's arguments on both issues. These matters formed the principal dispute on appeal, where the appellate court affirmed the trial court's decision.

Lengthy exposition of the insurance coverage issues is not appropriate here, but some brief discussion is needed to understand the problem. It is, of course, well settled that a spouse may sue the other spouse's insurer, in a direct action under the liability coverage afforded by the policy, for damages allegedly caused by the insured spouse's negligence; and the insurer is not entitled to plead interspousal immunity as a defense, it being personal to the insured spouse.[9] Because a direct action is permitted against an insurer on a liability policy, and because uninsured motorist coverage must be in-

6. 302 So. 2d at 713. Defendant's Exhibits D-1 and D-2, Gremillion v. State Farm Mut. Auto. Ins. Co., 302 So. 2d 712 (La. App. 3d Cir. 1974) found in record lodged with Third Circuit Court of Appeal and available in the Louisiana State University Law School Library.

7. LA. R.S. 9:291 (Supp. 1960) provides: "As long as the marriage continues and the spouses are not separated judicially a married woman may not sue her husband except for: (1) a separation of property; (2) the restitution and enjoyment of her paraphernal property; (3) a separation from bed and board; or (4) a divorce."

8. LA. R.S. 22:1406(D)(4) (Supp. 1958), *as amended by* La. Acts 1972, No. 137 reads: "In the event of payment to any person under the coverage required by this section . . . , the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made . . . ."

9. *See, e.g.*, Edwards v. Royal Indemn. Co., 182 La. 171, 161 So. 191 (1935).

cluded in a liability policy unless rejected by the insured,[10] the appellate court apparently felt comfortable in relying upon prior jurisprudence permitting a direct action *under liability coverage* by one spouse against the other's insurer. The present decision thus seems to constitute an extension of the right of direct action, consistent with prior jurisprudence,[11] to a suit by one spouse against the other's insurer *under the uninsured motorist coverage,* despite a slight difference in the wording of the two coverages.[12]

But as to the second issue, whether the insurer, once cast in judgment to the injured spouse, should be permitted to recover against the uninsured tortfeasor spouse, the court reached a different result from that reached under the liability/direct-action-by-spouse jurisprudence. The *Gremillion* court refused to permit the insurer to recover against the uninsured tortfeasor spouse, saying that the insurer "does not have a right to contribution from Mr. Gremillion as a solidary obligor but only a subrogation right obtained from its payment to Mrs. Gremillion. State Farm can have no greater right of action than that of its subrogor, Mrs. Gremillion, and her right of action is barred by interspousal immunity."[13] The court distinguished *Smith v. Southern Farm Bureau Casualty Insurance Co.*,[14] in which the insurer of a third party tortfeasor, made defendant by the wife in a suit for damages arising out of an accident between its insured and her spouse, was permitted to force contribution by her spouse of one-half

10. *See* LA. R.S. 22:1406(D)(1) (Supp. 1958), *as amended by* La. Acts 1974, No. 154.

11. *See, e.g.*, Edwards v. Royal Indemn. Co., 182 La. 171, 161 So. 191 (1935).

12. The insurer attempted to distinguish between the language used in the liability portion of the policy ("to pay on behalf of the insured all sums which the insured shall become *legally obligated* to pay") and that of the uninsured motorist provision ("to pay all sums which the insured or his legal representative shall be *legally entitled to recover*"). Its argument was that although prior jurisprudence permitted recovery by one spouse against the insurer even in the face of an interspousal immunity which would prevent the tortfeasor-spouse from becoming "legally obligated" to the other, the difference in language in the uninsured motorist provision should produce a different result in a direct action under the uninsured motorist clause. The argument was rejected. Gremillion v. State Farm Mut. Auto. Ins. Co., 302 So. 2d 712 (La. App. 3d Cir. 1974).

13. *Id.* at 716.

14. 247 La. 695, 174 So. 2d 122 (1965).

of her damages.[15] The *Gremillion* court saw the *Smith* case as one of contribution between solidary obligors and the instant case as one of subrogation.

While it is true that a subrogee has no greater rights than his subrogor, it is not clear that the question is one of subrogation. Perhaps the matter is clarified by substituting an uninsured neighbor for the husband as the driver of the motorcycle. In such a case, the insurer may certainly proceed against the neighbor for those sums which it has paid to the injured wife, though the statute does not mention whether this is on a theory of subrogation or one of solidarity.[16] Now, placing the husband again in the driver's seat, his claim is that no such action should lie against him—authority: interspousal immunity. But the statute granting the immunity mentions only suits between the spouses, not those between an insurer and a spouse, as the insurers discovered long ago.[17] And the same argument was rejected by the court in *Smith*, a situation in which the tortfeasor spouse merely shared the blame for injury with another; in *Gremillion* the

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15. In *Smith*, plaintiff wife was injured while riding as a passenger in her husband's vehicle, which was in a collision with another car owned and driven by one Bordelon and insured by Southern Farm. When Mrs. Smith sued Southern Farm, it filed a third-party demand against Mr. Smith seeking one-half of any judgment which it might be condemned to pay to Mrs. Smith. Mr. Smith argued that this forced him to pay one-half of his wife's damages, thus indirectly permitting her to sue him and eroding the principle of interspousal immunity. This argument was rejected by the court's decision to permit contribution. Citing other cases, the court emphasized that the wife had a substantive cause of action and thus he was an obligor as to her along with Southern Farm's insured. Southern Farm's right to contribution thus arose from its status as solidary obligor with the husband. "Therefore, at the time when the tortious conduct occurred, a legal liability or obligation was created in the husband, *in solido* with the other joint-tortfeasor, to repair the wife's damage caused through their concurring fault." *Id.* at 705, 174 So. 2d at 126.

16. *See* LA. R.S. 22:1406(D)(4) (Supp. 1958), *as amended by* La. Acts 1972, No. 137.

17. *See* LeBlanc v. New Amsterdam Cas. Co., 202 La. 857, 13 So. 2d 245 (1943) (interspousal immunity personal to spouses, not available to insurer); Edwards v. Royal Indemn. Co., 182 La. 171, 161 So. 191 (1935) (same; interestingly, at the time of the accident, the parties involved were engaged and remained in that status until the suit was filed, and then they married). *See also* Snell v. Stein, 261 La. 358, 259 So. 2d 876 (1972) (governmental immunity of insured not available to insurer in direct action); Lusk v. United States Fidelity & Guaranty Co., 199 So. 666 (La. App. Orl. Cir. 1941) (charitable immunity of insured not available to insurer in direct action).

tortfeasor spouse was entirely responsible for the damage and yet entirely escaped responsibility.[18]

Arguably the insurer's right to sue in *Gremillion* might also arise from its status as a solidary obligor with the tortfeasor spouse to the injured spouse, and thus the court's subrogation analogy might not be appropriate. It seems agreed on all sides that an injured spouse, though without a *right* of action against the other spouse because of interspousal immunity, nonetheless has a substantive cause of action which is procedurally barred.[19] In this case, it would be a cause of action sounding in tort and making the tortfeasor spouse the obligor as to the injured spouse.[20]

At the same time, and as to the same damage, the insurer becomes the obligor of the injured spouse in this factual situation under the uninsured motorist portion of the liability policy, at least according to this decision. There are then two obligors—the tortfeasor spouse and the insurer—liable to the injured spouse for the same damage, at least up to the policy limits.[21] The fact that one is an obligor in tort and the other in contract is of no moment; they are at least bound in imperfect solidarity.[22] Being so bound, the payment by one solidary debtor, the insurer, gives it the independent, substantive and

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18. The court in *Smith* said: "Furthermore, the husband, whose tortious conduct has helped to create the solidary obligation for which his joint tortfeasor must respond in full to the injured wife, should not be permitted to escape the consequence of his wrongdoing to parties other than his wife, such as his clear and apparent statutory obligation to divide the effects of the solidary debt by contributing to his solidary codebtor." 247 La. 695, 707, 174 So. 2d 122, 126 (1965). It might be argued that an even stronger case is presented where the tortfeasor spouse is the *sole*, rather than a contributing cause, of the other spouse's injury.

19. *See id.* at 704, 174 So. 2d at 125 and cases cited therein.

20. *Id. See* LA. CIV. CODE art. 2315: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it . . . ."

21. For an analogous case in which solidarity "up to the policy limits" permitted a holding of interruption of prescription to that extent by a suit against the insurer, see *Anderson v. Sciambra*, 310 So. 2d 128 (La. App. 4th Cir.), *cert. denied*, 313 So. 2d 835 (La. 1975), discussed in text at note 50, *infra*.

22. *See* LA. CIV. CODE art. 2901: "There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole; and when the payment which is made by one of them, exonerates the others toward the creditor"; LA. CIV. CODE art. 2092: "The obligation may be *in solido*, although one of the debtors *be obliged differently from the other to the payment of one and the same thing*; for instance, if the one be but conditionally bound, whilst the engagement of the

procedural right to contribution or indemnification, depending upon the circumstances, from its solidary co-debtor, the husband.[23] The *Gremillion* case is then not one of subrogation alone, but of indemnification among solidary debtors. Seen in this light, the *Smith* decision is difficult to distinguish from *Gremillion*.[24]

The result of *Gremillion* seems to be that while the wife is "legally entitled"[25] to recover from her spouse for her damages, he is not "legally responsible"[26] for those same dam-

other is pure and simple, or if the one is allowed a term which is not granted to the other" (emphasis added). *See also* Temple v. Harper, 200 So. 2d 749 (La. App. 4th Cir. 1967), a case in which the insured sued another driver with whom he was in a collision and the insured's own insurance company under the collision coverage. The insurer's defense was that plaintiff insured failed to notify it timely of the accident. A solidary judgment against the two defendants was rendered in the trial court, and the insurer appealed. The appellate court affirmed the trial court's holding as to solidarity, noting that the other driver was obligated in tort to the plaintiff for the damage and the insurer was obligated in contract to the plaintiff, thus creating imperfect solidarity up to the amount due by the insurer under the collision coverage.

23. *See* LA. CIV. CODE art. 2103; LA. CODE CIV. P. art. 1111; Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 695, 174 So. 2d 122 (1965). The fact that indemnification for the total amount paid may be sought by one solidary obligor against another should not in any way defeat a finding of solidarity. It should be remembered that the uninsured motorist and the insurer are not joint tortfeasors and for that reason solidarily liable to the injured spouse; they are solidary obligors for the reason that they are both bound to the same obligee for the same damage. The Civil Code expressly envisions indemnification as a possible relationship between solidary obligors in art. 2106: "If the affair for which the debt has been contracted *in solido*, concern only one of the co-obligors *in solido*, that one is liable for the whole debt towards the other codebtors, who, with regard to him, are considered only as his securities." *But see* Wooten v. Wimberly, 272 So. 2d 303 (La. 1973), and the comments in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations*, 34 LA. L. REV. 231 (1974) and in Note, 34 LA. L. REV. 648 (1974).

24. *See also* Walker v. Milton, 263 La. 555, 268 So. 2d 654 (1972), in which the supreme court, citing *Smith*, extended its rationale to a contribution action sought by the insurer of a driver involved in an accident with Mrs. Walker and her children. Upon a finding that Mrs. Walker was also negligent, the court permitted the insurer to receive contribution from her for her children's injuries caused by her and by its insured. It thus rejected the same argument as to child-parent immunity that had been rejected as to interspousal immunity in *Smith*, and overruled the earlier case of *Johnson v. Housing Authority*, 163 So. 2d 569 (La. App. 4th Cir. 1964). It is interesting that the author of the *Walker* opinion is Chief Justice Sanders, who had dissented in the *Smith* decision.

25. This is the language of the uninsured motorist clause of the policy.

26. This is the language of the uninsured motorist coverage statute, LA. R.S. 22:1406(D)(4) (Supp. 1958), *as amended by* La. Acts 1974, No. 154.

ages. This is certainly not logical and may not even be desirable. But certainly it is a matter of determining the policy behind the uninsured motorist statute and enforcing it. If the policy is to be that the insurer is to bear the kind of risk it did in *Gremillion*, then it would be better to reach that result directly and consistently, perhaps by overruling the jurisprudence which excludes motorcycles from the definition of non-owned automobiles under liability coverage.[27] And if the policy is to the contrary, then the result in *Smith* is commended to the court, based upon the existence of imperfect solidarity between the tortfeasor spouse and the insurer.

There are a number of points to criticize about the *Gremillion* decision: it may well be inconsistent with the purpose of uninsured motorist coverage;[28] it seems inconsistent with prior Louisiana jurisprudence on very similar issues, such as *Smith*[29] and *Walker v. Milton*;[30] it is contrary to the decision reached by apparently the only other court which has considered a similar issue;[31] and it seems to treat insurers by one

27. Guillory v. Deshotel, 251 So. 2d 91 (La. App. 3d Cir.), *cert. denied*, 259 La. 810, 253 So. 2d 67 (1971); Labove v. Traders & General Ins. Co., 219 So. 2d 614 (La. App. 3d Cir.), *cert. denied*, 254 La. 22, 222 So. 2d 69 (1969).

28. That purpose is usually said to be "to give the same protection to a person injured by an uninsured motorist as he would have if he had been injured in an accident caused by an automobile covered by a standard liability insurance policy." 12 G. COUCH, INSURANCE 2d § 45:623 at 570 (1964). *See also* 7 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICES 3d § 274.1 at 43-44 (1966) and Comment, *Uninsured Motorist Coverage in Louisiana*, 32 LA. L. REV. 431 (1972). Its purpose is not to provide "insurance or indemnification for the uninsured motorist, and the insurer does not stand in the shoes of the uninsured motorist who is the tortfeasor." Booth v. Fireman's Fund Ins. Co., 253 La. 521, 528, 218 So. 2d 580, 583 (1968). It is the clear policy of the statute and the coverage that, where financially feasible, the loss be borne by the tortfeasor, who is the uninsured motorist. *See* LA. R.S. 22:1406(D) (Supp. 1958), *as amended by* La. Acts 1974, No. 154. Consistent with this policy, insurers theoretically construct their premium schedules on the assumption that the uninsured motorist will at least be amenable to suit, although sometimes judgment proof.

29. Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 695, 174 So. 2d 122 (1965).

30. 263 La. 555, 268 So. 2d 654 (1972).

31. Noland v. Farmers Ins. Exch., 413 S.W.2d 530 (K.C. Ct. of App., Mo. 1967). Wife was a passenger in a lead vehicle and was injured when an uninsured vehicle driven by her husband ran into the back of the lead vehicle. The wife sued the insurer of the lead driver under its uninsured motorist coverage, but the court determined that there was no coverage, since the company only agreed to pay if the uninsured motorist was "legally responsible" for the tort. Since the wife could not sue the husband in Missouri, he was not legally responsible for the tort, and she was not covered

standard and individuals by another.[32] But the purpose of this over-lengthy discussion has been to spotlight the now-you-see-it, now-you-don't quality of imperfect solidarity demonstrated by the opinion.[33] This was an opportunity to put the doctrine to good use to avoid the inequitable result reached by the court, which regarded subrogation as the only possible legal theory on which recovery by the insurer could be based.

Interruption of Prescription as to Solidary Obligors

A triad of notable cases decided during the last term dealt with the interruption of prescription as to solidary obligors. *Trahan v. Liberty Mutual Insurance Co.*[34] was another stage in lengthy litigation arising out of the deaths of certain persons in a salt mine accident in 1970. Initially, a widow filed suit on behalf of herself and her children against six named executive officers of the company which owned the salt mine, and their insurers, Liberty Mutual and Insurance Company of North America (INA). At trial, a jury verdict was returned absolving all the defendants of liability;[35] the judgment entered on that verdict was affirmed by the appellate court,[36] and the supreme court denied writs.[37] Within a year of that final judgment, but well over a year after the accident, the widow filed another suit against the same insurers, asserting their liability to her because of the alleged negligence of yet another executive officer, arguably insured by them but not named in the first suit. The insurers filed a peremptory exception of prescription which was sustained by the trial court.[38] That decision was reversed by the appellate court,

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under the uninsured motorist clause. The court thus decided the issue at an earlier stage, eliminating the need of a discussion of any contribution rights.

32. This was noted by Judge Miller in his dissent in *Gremillion v. State Farm Mut. Auto. Ins. Co.*, 302 So. 2d 712, 717 (La. App. 3d Cir. 1974).

33. For a general discussion of the concept, see *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Obligations*, 35 LA. L. REV. 280, 291 (1974).

34. 314 So. 2d 350 (La. 1975). A companion case was decided the same day, Nunez v. Liberty Mut. Ins. Co., 314 So. 2d 356 (La. 1975).

35. 314 So. 2d at 351.

36. Trahan v. Liberty Mut. Ins. Co., 273 So. 2d 331 (La. App. 3d Cir. 1973).

37. Trahan v. Liberty Mut. Ins. Co., 275 So. 2d 791 (La. 1973).

38. The trial court thus did not reach a second peremptory exception filed by the insurers based upon a claim of res judicata. The appellate court, reversing the trial court's decision on the prescription issue, did reach the res

which remanded the case for trial.[39] At the request of the insurers, the Louisiana Supreme Court granted writs.

The single issue facing the court was whether the first suit had interrupted prescription, which would otherwise clearly bar the second suit. Plaintiff argued, under Louisiana R.S. 9:5801,[40] that all prescriptions affecting the cause of action were interrupted as to all defendants by the commencement of the action in a court of competent jurisdiction and in the proper venue, since the cause of action in the first and second suits was identical. The supreme court rejected the argument on the basis that the second suit, having the negligence of yet another executive officer as its ground of complaint, was not the same cause of action.[41]

The court of appeal had rested its decision that prescription had been interrupted, however, principally upon Civil Code article 2097.[42] It believed that the two insurers were solidarily liable with regard to the plaintiff, and therefore the first suit against Liberty interrupted prescription against INA, and vice versa.[43] The supreme court properly disagreed, noting that the two insurers were not solidarily liable with

judicata claim and also found no merit in that exception. Trahan v. Liberty Mut. Ins. Co., 303 So. 2d 606, 610-11 (La. App. 3d Cir. 1974).

39. Trahan v. Liberty Mut. Ins. Co., 303 So. 2d 606 (La. App. 3d Cir. 1974).

40. "All prescriptions affecting the cause of action therein sued upon are interrupted as to all defendants, including minors or interdicts, by the commencement of a civil action in a court of competent jurisdiction and in the proper venue. . . ." LA. R.S. 9:5801 (Supp. 1960). It has been held that the phrase "all defendants" used in the statute means only those defendants *named* in the petition, and thus the statute has no application to him. *See* Majesty v. Comet-Mercury-Ford Co., 296 So. 2d 271 (La. 1974); Jacobs v. Harmon, 197 So. 2d 704, 707 (La. App. 4th Cir. 1967). This would have avoided dealing with the thorny issue of right of action versus cause of action. *See also* Anderson v. Sciambra, 310 So. 2d 128 (La. App. 4th Cir.), *cert. denied*, 313 So. 2d 835 (1975).

41. Trahan v. Liberty Mut. Ins. Co., 314 So. 2d 350 (La. 1975). "A cause of action in tort has no identity independent from the defendant upon whose fault it is based." *Id.* at 353.

42. "A suit brought against one of the debtors *in solido* interrupts prescription with regard to all."

43. *See* Trahan v. Liberty Mut. Ins. Co., 303 So. 2d at 610: "Although this article has been cited, counsel may have overlooked the fact that both Liberty Mutual and INA were sued in the first suits, and that they are now sued as solidary obligors. Thus the first suits against Liberty Mutual interrupted prescription as to the instant suits against INA, and, likewise, the first suits against INA interrupted prescription in the present suits against Liberty Mutual, the interruption taking place because they are alleged 'debtors in solido' as the article provides."

regard to plaintiff; only the joint tortfeasors, if any, would be solidarily liable to plaintiff. The additional fact that a tortfeasor and his insurer are liable *in solido* to the victim[44] did not produce the final leg of the triangle: solidarity between the insurers as to the victim.[45] Since the six executive officers sued in the first suit were absolved of any liability and thus were not obligated to plaintiff in any way—solidarily or otherwise[46]—this meant that they could not be bound *in solido* with the additional executive officer upon whose alleged negligence the second suit was based. And without an interruption as to that additional executive officer, there was no interruption as to his insurers.[47]

In the *Trahan* case, the court distinguished the second of this series of three cases, *Simmons v. Travelers Insurance Co.*[48] In that case, suit was timely filed against four executive officers and a liability insurer. Some time later, more than a year after the accident in question, a supplemental and amending petition was filed, naming a fifth executive officer and alleging coverage by the same liability insurer. That officer interposed a plea of prescription as to his personal liability, which plea was rejected by the trial court and that decision was affirmed by the appellate court. The appellate court, citing a recent supreme court decision,[49] took the view that the fifth officer and the insurer were or could be solidarily liable to the plaintiff, and thus the initiation of the suit

44. LA. R.S. 22:655 (Supp. 1958), *as amended by* La. Acts 1962, No. 471 § 1.

45. This is not the first time that a similar holding has appeared. In the analogous case of *Tabb v. Norred*, 277 So. 2d 223 (La. App. 3d Cir. 1973), it was held that the fathers of two minor tortfeasors were solidarily liable, as between themselves, to the victim. *See* comments on that decision in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations*, 34 LA. L. REV. 231 (1974).

46. This solution was suggested in a similar situation. *See The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations*, 34 LA. L. REV. 231, 231-32 n.7 (1974) [commenting on Wooten v. Wimberly, 272 So. 2d 303 (La. 1973)].

47. "[T]here must be a solidary obligation to plaintiff of one or more of the six named executive officers (and, as a consequence, their insurers) and [the seventh officer] . . . . The judgment in the first suit absolving the six named executive officers (and, as a result, their insurer) means that those executive officers (and their insurers, in that capacity) cannot be solidary debtors with [the seventh officer] (and accordingly his insurers in that capacity) as they are not liable to plaintiff on the claim asserted in the first suit." Trahan v. Liberty Mut. Ins. Co., 314 So. 2d 350, 356 (La. 1975).

48. 295 So. 2d 550 (La. App. 3d Cir. 1974).

49. Pearson v. Hartford Accident & Indemn. Co., 281 So. 2d 724 (La. 1973).

against the insurer had interrupted prescription as to the officer.

The *Trahan* court's basis of distinction was twofold: (1) plaintiff's original petition in *Simmons* had named the insurer as a defendant "as general liability insurer of *all* the executive officers" of the corporation which employed the injured plaintiff,[50] whereas in *Trahan* the original petition named Liberty Mutual and INA as insurers only of the six named executive officers; and (2) the joinder of the additional executive officer in *Simmons* had occurred prior to trial, whereas in *Trahan* the second suit followed a first trial which had absolved all six of the individual defendants in the first suit of liability.

The third decision was *Anderson v. Sciambra*,[51] in which plaintiff, injured in a fall from a rear porch at his apartment, timely sued the man he knew as his landlord and that man's insurer. Thereafter, at a point in time more than a year after the injury occurred, those defendants disclosed that the leased premises had been donated to the man's daughter by an act recorded almost a year before the injury. Plaintiff amended to name the daughter as a defendant, and she promptly pleaded prescription, since the amendment came over a year after the injury. The trial court sustained her exception and also dismissed the suit against her father and the insurer on the basis of nonliability. The appellate court, however, reversed as to the insurer[52] and, to the extent of the insurer's policy limits on liability coverage, as to the daughter. Its reasoning was that the daughter and the insurer were, up to the policy limits, solidarily bound to the plaintiff,

50. The language is the court's in *Trahan*, 314 So. 2d at 355, and is apparently based upon Paragraph 10 of plaintiff's original petition, which, following an allegation that the insurer was the liability insurer of the four named executive officers, read as follows: "Further, plaintiff alleges on information and belief that Travelers Insurance Company had a general liability insurance policy and/or workmen's compensation insurance policy in favor of Nat Harrison Associates, Inc. and its executive officers, directors, stockholders, engineers, supervisory personnel and employees." Record lodged on appeal to the third circuit at R-31, available in Louisiana State University Law Library. The petition does not contain the word "all."

51. 310 So. 2d 128 (La. App. 4th Cir.), *cert. denied*, 313 So. 2d 835 (La. 1975).

52. The policy still named the parents as insureds, but the court said that the naming of the parents as the insureds was a mutual mistake in light of the donation which had occurred, and treated the policy "as reformed to name the daughter as the insured." 310 So. 2d at 131.

and that the suit against the insurer interrupted prescription as to the daughter to the extent of those policy limits.[53]

Where do these decisions lead? They certainly lead to the conclusion that even greater care must be exercised in the drafting of pleadings. What would have happened, for example, if the plaintiff in *Trahan* had alleged that Liberty Mutual and INA were the insurers of *all* executive officers of the corporation, rather than specifying that they were insurers of only the six named individuals? Would this not have made the case like *Simmons*, and for that matter like *Anderson* and *Pearson v. Hartford Accident & Indemnity Co.*,[54] situations in which prescription is interrupted because the insurer of a solidary obligor is sued before prescription, and the obligor himself after? Is it a sufficient ground of distinction that the first suit is over? If so, can one then initiate a new suit while the first one is on appeal and not yet final? Could one then simply sue an insurer, alleging coverage as to all possible parties, and then pick through the individuals, perhaps in successive trials, until the right one is found? The indication that a slight change in the pleadings in *Trahan* to allege that the two insurers were the insurers of all executive officers of the company might have permitted plaintiff to survive the plea of prescription and proceed with a second suit against the seventh executive officer after she lost against the original six raises this possibility.

These decisions also lead to the conclusion that a timely suit against an "answerable" defendant, financially responsive for the acts of a tortfeasor, will interrupt prescription as to that tortfeasor[55] even though he might not himself be sued until well after the prescriptive period has expired. This is no doubt consistent with the philosophy of direct action, but it may well work considerable hardship upon the "answerable" defendant if a long delay intervenes before the "right" tortfeasor is found or if multiple suits are permitted. It would appear the direct action statute ought to work both ways:

53. This was essentially the same decision as that reached by the supreme court in *Pearson v. Hartford Accident & Indemn. Co.*, 281 So. 2d 724 (La. 1973).

54. 281 So. 2d 724 (La. 1973).

55. This is the converse of a suggestion made in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations*, 34 LA. L. REV. 231, 236 (1974), that at least it should be provided that a suit against the "primary" defendant (the tortfeasor) will interrupt prescription as to any "answerable" defendant.

once the insurer has gone to trial and been absolved of liability, some legal principle—whether it be res judicata, prescription, some form of estoppel or some other principle—ought to put the matter at an end.[56]

COMPROMISE AND RELEASE

The strong jurisprudential principle favoring compromise and settlement of cases [57] may have suffered some erosion in two cases decided during the last term. The first of these, *Schiffman v. Service Truck Lines, Inc.*,[58] appeared to be a matter of first impression. Husband was injured by defendant's employee, and lay in a coma for more than four years before he died. Wife was appointed curatrix of her husband, and during his comatose period, she executed in that capacity a "receipt and release," acknowledging receipt of $75,000 on her husband's behalf. That instrument also recited that the wife

> joins in her individual capacity the Release executed by her as Curatrix . . . hereby releasing, remitting and forever discharging [defendants] from all claims . . . which . . . Appearer has had, now has or may in the future have, in the event [the husband] should die, to recover for his conscious pain and suffering through the date of his death, all expenses incurred therefrom . . . *and for her own individual losses and claims which may arise from his death.*[59]

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56. *See Wooten v. Wimberly*, 272 So. 2d 303 (La. 1972), a case in which it was quite clear that plaintiff ought not to be permitted to sue a second time on the same facts on which he lost the first time, and sympathize with the court's difficulty in finding an appropriate justification for that outcome.

57. *E.g.*, Jackson v. United States Fidelity & Guaranty Co., 199 So. 419 (La. App. 2d Cir. 1940).

58. 308 So. 2d 824 (La. App. 4th Cir. 1974).

59. *Id.* at 826 (court's emphasis). Is this instrument different from one such as that in *Johnson v. Sundbery*, 150 So. 299 (La. App. 1st Cir. 1933), in which the victim "settled" all claims, and later died? In that case, the court held that the compromise could not affect the wrongful death action of the victim's beneficiaries under LA. CIV. CODE art. 2315, since their rights arose only on her death and thus were unable to be "compromised" by her. If the wife in *Schiffman* was acting as curatrix in effect giving legal capacity to the victim, would it have been sufficient to cite *Johnson v. Sundbery* and declare that the wife could not have settled the wrongful death claim at the same time? Resolution of the issue would seem to turn on the wording of the

About six months after the instrument was executed, the husband died, and the wife individually and on behalf of her four children brought a wrongful death action.[60] Defendants interposed a peremptory exception of res judicata based upon the release, and the trial court sustained the exception. The appellate court, however, with one dissent,[61] reversed the trial court and overruled the exception.

The appellate court rejected the wife's argument that the instrument was not explicit enough to conclude that she intended to settle[62] the wrongful death claim, and this seems clearly correct. But the court then held the instrument was invalid "as against the public policy prohibiting dealing in or renunciation of rights whose coming into existence requires the death of a living person."[63] As authority for that "public policy" the court cited three articles of the Civil Code having to do with acceptance, renunciation or sale of the succession of a living person.[64] These articles do not mention wrongful death actions, but the court correctly notes that the action

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release, which appears to involve more than just the victim's claim, compromised through the curatrix.

60. No mention was made in the instrument of the rights of the four children arising upon the husband's death, and thus no issue was presented to the court as to their rights.

61. Since the decision of the trial court was reversed, but with dissent, under the new constitution, it would have been necessary to re-argue the case before a panel of five appellate judges. LA. CONST. art. V, § 8(B) reads: "A majority of the judges sitting in a case must concur to render judgment. However, when a judgment of a district court is to be modified or reversed and one judge dissents, the case shall be reargued before a panel of at least five judges prior to rendition of judgment, and a majority must concur to render judgment." Since the decision in this case was rendered December 30, 1974, and the constitution became effective at midnight on December 31, 1974, this section presumably did not apply. *See* LA. CONST. art. XIV, § 23.

62. The court classified the instrument as an onerous remission rather than a compromise since the wife did not receive any payment individually. *See* Schiffman v. Service Mech. Lines, Inc., 308 So. 2d 824, 826 n.1 (La. App. 4th Cir. 1974).

63. 308 So. 2d at 826.

64. LA. CIV. CODE art. 984: "The acceptance or rejection made by the heir, before the succession is opened or left, is absolutely null and can produce no effect; but this does not prevent the heir who has thus accepted, from accepting or rejecting validly the succession when his right is complete." LA. CIV. CODE art. 1887: "Future things may be the object of an obligation. One cannot, however, renounce the succession of an estate not yet devolved, nor can any stipulation be made with regard to such a succession, even with the consent of him whose succession is in question." LA. CIV. CODE art. 2454: "The succession of a living person cannot be sold."

was not recognized when the articles were written. Then the court concludes that "contracting in future rights whose coming into existence requires a living person to die is no more acceptable in wrongful death cases than in succession cases .... Dealing in such rights is contrary to morals, moral conduct and public order . . . and therefore ineffective."[65]

The court's opinion makes a substantial leap in going from articles dealing specifically with successions to a decision on the compromise of a wrongful death claim. The reasons for the articles prohibiting acceptance, renunciation or sale of the succession of a living person are only in part based on morality and, even then, there is no reason to think they should be expanded beyond their own terms. Certainly both Roman[66] and French law[67] acknowledged that dealing in a future succession might produce some danger to the living

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65. Schiffman v. Service Truck Lines, Inc., 308 So. 2d 824, 827 (La. App. 4th Cir. 1974).

66. The Romans apparently were not quite as rigorous as the French and the Louisianians. Agreements concerning future succession rights were permitted by the Romans with the consent of the person whose succession was to be the object of the rights. *See* 16 F. LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS n° 84 (2d ed. 1876).

67. *See* 16 F. LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS n° 83 (2d ed. 1876): "The place which Article 1130 [LA. CIV. CODE art. 1887] occupies seems to imply that the lawmaker prohibited agreements on future succession because they had for their object something which did not exist and might never exist. It is true that there is no such thing as the succession of a living person, but future things also do not exist, and yet they can become the object of conventions. There must then have been a particular reason for which the lawmaker prohibited all conventions on a future succession, even in the most favored of contracts, the marriage contract. Bigot-Préameneu says, in the *exposé des motifs*, that such conventions are disapproved because they are contrary to public honesty. This is the expression of Pothier, who says: 'There are some things which it is contrary to decency and good morals to hope for, such as a future succession since one can only hope for it by hoping for the death of the person whose succession will be opened thereby; and this is something that good morals does not permit.' A guilty desire might give rise to criminal thoughts. *Les pactes successiores* are thus contrary to good morals and public order" (author's translation). *See also* 7 T. HUC, COMMENTAIRE THEORIQUE ET PRATIQUE DU CODE CIVIL n° 72 (1894) and *Juris-Classeur Civil* Art. 1600 at 2: "Article 1600 [LA. CIV. CODE art. 2484], in forbidding the sale of the succession of a living person, is just one application of a general principle of our law as to this kind of contract. But it is evident that only future successions are covered by this prohibition; all other future things may be the object of a contract by virtue of Article 1130 [LA. CIV. CODE art. 1887], first paragraph, and are susceptible of being sold" (author's translation).

person, since one could only entertain thoughts about or rights in that succession while thinking at the same time of the death of the living person. But there were surely other reasons as well, at least in the sale of a future succession, such as the fact that the rights of the "heir" were speculative and might never in fact come into existence, thus making protection of the vendee an additional reason for the prohibition.

The same considerations do not appear to be true of the wrongful death action. First, there is no "vendee" in the normal sense of that word, and there is no reason to protect the compromising tortfeasor in the future. Second, the contract in question is one of settlement and release. Neither in its confection nor subsequent to it is the death of the victim material. Neither party would have any reason to seek the death of the victim, which is the "moral" problem with the sale of the succession of a living person. Certainly the defendants would gain nothing by his death; theoretically they have already paid the damages to be suffered by that event. And certainly the wife gains nothing by his death—unless it be the right to ignore the terms of a settlement such as this one and bring suit. If that is the case, the court's decision to void the settlement ironically might foster those "immoral" thoughts that it wants to avoid.

Even if the court is correct in its view of the premature settlement of a wrongful death claim, its statement of the "public policy" might be too broad. Is not term life insurance "contracting in future rights whose coming into existence requires a living person to die"? Could it then be said that term life insurance is against "public policy"?

Certainly, as the court notes in its opinion, the matter "is far from free of doubt."[68] But in light of the fact that the Civil Code specifically provides that "future things may be the object of an obligation"[69] and excepts from that only the succession of a living person, and taking into account the strong principle favoring compromise and settlement of lawsuits, it might have been preferable to resolve the doubt in the opposite direction.

The second case[70] dealing with compromise and settle-

68. Schiffman v. Service Truck Lines, Inc., 308 So. 2d 824, 827 (La. App. 4th Cir. 1974).

69. *See* text of LA. CIV. CODE arts. 984, 1887, 2454 at note 64, *supra.*

70. Berger v. Fireman's Fund Ins. Co., 305 So. 2d 724 (La. App. 4th Cir. 1974).

ment arose out of the death of a seven-year-old girl after she allegedly sustained a puncture injury in a school yard accident when struck by a piece of wire thrown up by a lawn mower. She was rushed to a hospital, underwent surgery, but died the next day. Her parents filed suit timely, but having executed a compromise with the school board, [71] named only the surgeons, the hospital and the hospital's insurer[72] as defendants.

The central issue was the wording of the compromise, which, after reciting that the parents asserted a claim against the school board and that the school board denied liability but each wanted to settle the controversy, reflected receipt of some $42,730 for which

> appearers, for themselves, their heirs and assigns do hereby expressly release and forever discharge the Jefferson Parish School Board, *and all other persons* from any and all claims or damages arising out of or in any way connected with the death, injury, damages, loss of love and affection, medical expenses and funeral expenses of the said minor daughter . . . and any and all injury, costs, damages or expenses received or sustained by appearers as the result thereof . . . .[73]

During a discovery deposition prior to the filing of suit, this compromise came to light, and, based upon it, the surgeons filed a motion for summary judgment, which was granted by the trial court. The parents appealed, contending that two separate causes of action were present, one against the school board for the initial injury and one against the surgeons for subsequent medical malpractice in treating the injury. They alleged that only the former had been compromised, despite the broad language of the release.[74] To this

71. The injury in the school yard occurred on March 28, 1972; the victim died on March 29, 1972; the compromise was executed on July 18, 1972; and suit was filed March 28, 1973.

72. Following the revelation of the compromise, the hospital and its insurer filed an exception of res judicata which was sustained, and that decision was not appealed.

73. Berger v. Fireman's Fund Ins. Co., 305 So. 2d 724, 726 (La. App. 4th Cir. 1974). The release continues: "at or about the time and place stated above, or at any other time or place, irrespective of how the same may have arisen, or under what laws; and appearers hereby acknowledge for themselves, their heirs and assigns, full and final satisfaction thereof and therefor."

74. Plaintiffs-appellants' brief pointed to the other portions of the release

the surgeons countered that the language of the release in favor of "all other persons" was unambiguous and thus served to release them. And further, they argued, since an original tortfeasor, the school board in this case, is liable *in solido* with a negligent physician for additional injury caused to the victim by that negligence,[75] and no rights were reserved against them in the release of one solidary obligor, they were released by virtue of the tenents of Louisiana Civil Code article 2203.[76]

The thrust of the court's decision on appeal was that a motion for summary judgment was not an appropriate vehicle to dispose of the case in its present status. The court noted first that an issue of fact existed surrounding the intentions of the plaintiffs in entering the disputed compromise agreement. Then it noted that the surgeons' argument based upon solidarity depended not upon a holding that the school board and the surgeons were *joint* tortfeasors,[77] but rather upon a holding that *each* was a tortfeasor, *and as to the injury suffered subsequent to the school yard incident*, each might be liable to plaintiffs. This depended upon proof that the school board's employee was negligent in the operation of the mower, a point neither alleged nor proven.[78] Since this holding

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which were specific in limiting plaintiffs' claim to the school board, in noting the school board's denial of the claim, and in stating that it was the desire of plaintiffs and the school board to settle the controversy. There was no reference in these portions to "all other persons." Plaintiffs-Appellants Original Brief, Berger v. Fireman's Fund Ins. Co., 305 So. 2d 724 (La. App. 4th Cir. 1974) at 2, to be found in duplicate of appellate record in Louisiana State University Law Library.

75. The surgeons cited *Hillebrandt v. Holsum Bakeries, Inc.*, 267 So. 2d 608 (La. App. 4th Cir. 1972), *Thibodaux v. Potomac Insurance Co.*, 201 So. 2d 159 (La. App. 1st Cir. 1967), and *Hudgens v. Mayeaux*, 143 So. 2d 606 (La. App. 3d Cir. 1962), for this proposition.

76. LA. CIV. CODE art. 2203: "The remission or conventional discharge in favor of one of the codebtors *in solido*, discharges all the others, unless the creditor has expressly reserved his right against the latter. In the latter case, he cannot claim the debt without making a deduction of the part of him to whom he has made the remission."

77. It did not appear to the court that, in the terms of LA. CIV. CODE art. 2324, the surgeons had "caused" the school board "to do an unlawful act" or that they had assisted or encouraged in the commission of it.

78. The school board was not named as a defendant, and the original petition limited itself to a recitation that the child "sustained a puncture injury as a result of a school yard accident, wherein a piece of wire was thrown by a lawnmower." Plaintiffs' Original Petition, Berger v. Fireman's Fund Ins. Co. at R.2, appellate record to be found in Louisiana State University Law School Library.

would produce solidarity as to the subsequent damage and would be necessary to establish the surgeons' affirmative defense of release because there was no reservation of rights in the compromise agreement, the burden of proving that the school board's employee was negligent apparently would lie with the surgeons, an unusual situation to say the least.

Plaintiffs on remand obviously would have to demonstrate that the subsequent injury constituted a totally different tort, for which the original tortfeasor would not have been responsible in any event.[79] This would defeat any possibility of solidarity as to the subsequent damage, and thus eliminate the surgeons' argument that they were released as solidary obligors because there was no reservation of rights against them. The case would then turn upon the meaning of the phrase "and all other persons" in the compromise itself.[80]

The decision seems correct in view of the fact that the court had the case before it on appeal from a successful motion for summary judgment, and there were genuine issues of material fact to be resolved. But it stands as a strong reminder that an instrument of compromise and release must be carefully drawn, lest one or both sides regret that it was effected.

ILLEGAL CAUSE

Several cases decided during the last term involve the issue of illegal cause of obligations. The first of these, *Orkin Exterminating Co. v. Foti*,[81] involving non-competition clauses in employment contracts, appears to resolve a dispute of long standing between the courts of appeal. Since this is a

79. This was discussed by Judge Gulotta in his concurring opinion. He noted that the cases cited by the majority (and the surgeons), *supra*, note 75, all involved negligent medical treatment which was connected to the original tort or aggravated it or flowed directly from it, while the present case might be one of a remote, unconnected, intervening act, independent of the original tort. In any event, because this presented a factual question, he concurred in the remand.

80. The surgeons asserted in their appellate brief that "what obviously happened is that after entering into the release, the plaintiffs changed their minds and decided that it would be an attractive proposition for them to attempt to get some more money from the surgeons." Defendants-Appellees' Original Brief, Berger v. Fireman's Fund Ins. Co., 305 So. 2d 724 at 5, to be found in duplicate appellate record in Louisiana State University Law School Library.

81. 302 So. 2d 593 (La. 1974).

matter which has provoked considerable doctrinal commentary, some of it recent,[82] only a brief mention of the decision need be made.

For a considerable period of time, the legality of agreements exacted by employers from their employees not to compete with them after the termination of an employment relationship was solely a jurisprudential matter, since there was no statute on the question. In 1934, however, Louisiana Act 133 declared it to be the "public policy" of Louisiana that employers should not require or direct their employees to enter contracts with non-competition clauses, thus effectively preventing employers from restraining their employees from entering competing businesses for themselves or for others after leaving the employer's business. The substance of this act became section 921 of Title 23 in the Revised Statutes of 1950 and remained unchanged until Act 104 of 1962 added a proviso to the basic prohibition against non-competition clauses to permit a limited[83] version of such clauses when the employer has incurred "an expense in the training of the employee" or "an expense in the advertisement of the business that the employer is engaged in . . . ."[84]

The vagueness of the words "an expense" in the proviso produced a series of inconsistent decisions by the various courts of appeal. Generally speaking, decisions of the Third Circuit Court of Appeal seemed to require the employer, to enforce a non-competition clause, to show some substantial training or advertising expense which singled out the employee from his fellows or in the public eye,[85] while the

82. Comment, *Agreements Not to Compete*, 33 LA. L. REV. 94 (1972); Comment, *Obligations—Agreements in Restraint of Competition*, 11 LA. L. REV. 383 (1951); Note, 27 TUL. L. REV. 364 (1953).

83. Under the proviso, the employee is permitted to bind himself not to enter into the same business as that of the employer, "over the same route or in the same territory for a period of two years." LA. R.S. 23:921 (Supp. 1962).

84. In full, the proviso to the basic prohibition reads as follows: "provided that in those cases where the employer incurs an expense in the training of the employee or incurs an expense in the advertisement of the business that the employer is engaged in, then in that event it shall be permissible for the employer and employee to enter into a voluntary contract and agreement whereby the employee is permitted to agree and bind himself that at the termination of his or her employment that said employee will not enter into the same business in which employer is engaged over the same route or in the same territory for a period of two years."

85. The leading case in this line is *National Motor Club of Louisiana, Inc. v. Conque*, 173 So. 2d 238 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So. 2d

decisions of the other circuits were normally more lenient in permitting the employer to support a limited non-competition clause by showing ordinary administrative costs incurred in training or advertising.[86]

Support for the more stringent view of the statute had previously been urged,[87] and the supreme court took this position in the *Foti* case. The employee had been with the company about five years, having been transferred to various offices within the state as a managerial-level employee. He had apparently signed several employment contracts over these years, but only the last of these was at issue in the litigation. In that last contract, the employee agreed not to engage in the pest control business, for two years after his employment terminated, in the cities of Alexandria, Crowley, Monroe, Lafayette, Lake Charles, Natchitoches, New Iberia, Shreveport or Ruston, or anywhere within a radius of fifty miles of each. It could be argued that the breadth of this prohibition might in itself have voided the agreement since the statute limits such clauses to engaging in the employer's business "over the same route or in the same territory," a phrase which would not appear to permit inclusion of virtually the entire state as does this prohibition.

However, the court did not choose to invalidate the non-competition clause on that basis, but rather met squarely the issue of what expenses the employer must demonstrate to

110 (1965). It was followed by *Weight Watchers of Louisiana v. Ryals*, 289 So. 2d 531 (La. App. 1st Cir. 1973), a decision in which the First Circuit Court of Appeal apparently abandoned its own position lenient to the employer and joined the third circuit's rationale. Accordingly, *Ryals* was affirmed by the Supreme Court of Louisiana, 302 So. 2d 598 (1974), on the same day that the court decided the *Foti* case. Another case in the *Conque* line was *Peltier v. Hebert*, 245 So. 2d 511 (La. App. 3d Cir. 1971).

86. The leading case in this line is *Aetna Finance Co. v. Adams*, 170 So. 2d 740 (La. App. 1st Cir. 1964), *cert. denied*, 247 La. 489, 172 So. 2d 294 (1965). The *Adams* decision was followed by the second circuit in *World Wide Health Studies, Inc. v. Desmond*, 222 So. 2d 517 (La. App. 2d Cir. 1969) and by the fourth circuit in *National School Studies, Inc. v. Barrios*, 236 So. 2d 309 (La. App. 4th Cir. 1970). It was even apparently followed by the third circuit, the originator of the *Conque* line, in *Louisiana Office Systems, Inc. v. Boudreaux*, 298 So. 2d 341 (La. App. 3d Cir. 1974). However, writs were granted in *Boudreaux* and the decision was reversed and remanded for further proceedings in the light of the *Foti* decision, 302 So. 2d 37 (La. 1974). On remand, the court not having received a brief from either party and the matter being apparently moot, the appeal was dismissed. 309 So. 2d 779 (La. App. 3d Cir. 1975).

87. *See* Comment, *Agreements Not to Compete*, 33 LA. L. REV. 94, 109 (1972).

support such a clause. Plaintiff employer had sought an injunction enforcing the non-competition clause when the employee quit and went into the pest control business for himself in Opelousas. The employer was granted an injunction by the trial court, but only as to those parts of the employment agreement which prohibited the employee from soliciting business from customers of the employer formerly serviced by him as an employee.

The employer appealed, seeking enforcement of the general non-competition clause as well. The appellate court affirmed, with one dissent.[88] The supreme court's decision to affirm the appellate court appears to be based on its view that the statute expresses a strong public policy against non-competition clauses and that the consequent heavy burden on the employer to satisfy its conditions for enforcement of such a clause was not met by Orkin. The court took note that the employer's only evidence on the "expense" issue was the expenditure of some $260 for a manager training school attended three years earlier and the employee's attendance at three or four one-day service training schools. The court found these expenses insufficient to satisfy the requirement of specialized training expenses.

There is no question that the court's decision in *Foti* constitutes a gloss on the wording of Louisiana R.S. 23:921, since that statute merely refers to "an expense" in training or "an expense" in advertising. The gloss is justified by the court on the ground that the policy of the statute, even as amended, disfavors non-competition clauses. It might also be said that the proviso permitting limited non-competition clauses is an exception to the general rule, and should be narrowly construed to prevent erosion of the statute's principal intendment. In any case, the conflict apparently is settled, at least for the moment; hence, an employer who seeks to enforce a limited non-competition clause had best be prepared to prove that he has invested substantial sums in special

88. 287 So. 2d 569 (La. App. 3d Cir. 1974). Judge Miller dissented on the ground that the majority had minimized the employer's expenses in training the employee. He pointed out that the employee knew nothing about the business when he started, but after four years with the employer, managed to pass the "difficult" state licensing test. Five months later, he quit the company. Judge Miller concluded that "the facts of this case present a classic case for enforcement" of the statute. *Id.* at 576.

training of the employee or in advertising the employee's connection with his business.[89]

Another case in which the court voided an agreement as having an illegal cause was *Aucoin v. Williams*.[90] Plaintiff, an attorney, was employed by defendant to defend her in a divorce action filed by her husband and to assert her rights to the community property, especially a share in whatever proceeds might be derived from a pending tort action to recover damages for an injury which the husband incurred during the marriage. Their oral fee agreement was described by plaintiff as including a "contingent" fee, "based upon one-third of all amounts recovered, if any."[91] Eventually a judgment of divorce was rendered, recognizing each spouse as the owner of a one-half interest in the pending cause of action. Still later the tort action was compromised for $175,000. The original divorce suit was apparently compromised[92] before it was heard in the supreme court, although that court had granted writs to hear the case.[93] Plaintiff then filed the present action, claiming that, based upon the rationale of *Chambers v. Chambers*,[94] his client was entitled to one-half of the $175,000, and he in turn was entitled to one-third of the amount she received, or a total fee of some $29,000.

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89. The language is that of the *Conque* court at 173 So. 2d 241 (La. App. 3d Cir.), *cert. denied*, 247 La. 875, 175 So. 2d 110 (1965), repeated by the *Foti* court at 302 So. 2d 597 (La. 1974). In further explaining the requirement, the *Foti* court adds: "If an employer extensively advertises a particular employee as the man to go to for the employer's type of services, it is not unfair to protect the employer's investment in this particularized asset by authorizing a limited non-competition agreement to prevent the advertised employee from misusing it. If an employer spends a substantial sum affording special training to an employee, it may not be unfair to protect the employer by authorizing a limited non-competition agreement to prevent the employee from using this specialized training for the benefit of another in competition with his former employer." Orkin Exterminating Co. v. Foti, 302 So. 2d 593, 597 (La. 1974).

90. 295 So. 2d 868 (La. App. 3d Cir.), *cert. denied*, 299 So. 2d 798 (La. 1974): "Writ denied. We cannot say that the judgment is incorrect." Mr. Justice Dixon dissented from the refusal to grant writs on the ground that the case could be distinguished from *Succession of Butler*, 294 So. 2d 512 (La. 1974), on which the appellate court relied.

91. Aucoin v. Williams, 295 So. 2d 868, 869 (La. App. 3d Cir. 1974).

92. *See* Chambers v. Chambers, 259 La. 246, 272, 249 So. 2d 896, 905 (1971) (Tate, J., dissenting).

93. Alfred v. Alfred, 256 La. 847, 239 So. 2d 356 (1970).

94. 259 La. 246, 249 So. 2d 896 (1971).

In defending against his claim, the wife raised several issues not reached by the court,[95] which chose to base its decision on the fact that the fee in question was contingent upon dissolution of the marriage, and that such a contract was in derogation of the marriage relation and against public policy. In doing so, the appellate court closely followed and quoted at length from *Succession of Butler*,[96] a similar case decided recently by the supreme court and excellently discussed in a portion of last year's symposium by a colleague.[97]

In *Butler*, attorneys employed to file a suit for separation from bed and board for a contingent fee of 10% of any assets recovered from the community attempted to enforce the contract against the succession of the husband, who had died during the pendency of the separation action. The Louisiana Supreme Court, approving the decision of both lower courts, affirmed the decision of the appellate court that the contract violated the public policy that marriage relations should be surrounded with every safeguard and every attempt should be made to reconcile estranged couples.[98] It accordingly refused to enforce the contract, leaving the attorneys an alternative cause of action in quantum meruit.[99]

The court in *Aucoin* found *Butler* indistinguishable and invalidated the contingent fee contract, pointing out that nothing in its opinion would bar plaintiff from filing an action in quantum meruit for services rendered. The judgment

95. She contended that her husband, as head and master of the community, had agreed with the attorneys in his tort action on a contingency fee of one-third, which fee had to be deducted before any distribution of the funds to the two spouses. She also contended that in the absence of any written contract between plaintiff attorney and herself, the contract was one of mandate, revocable at will by the principal, which power she had exercised. And finally, she asserted that plaintiff was not entitled to a lien on the proceeds of the settlement under LA. R.S. 9:5001 (1950), because this was not the type of judgment countenanced by that statute.

96. 294 So. 2d 512 (La. 1974).

97. *See The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Professional Responsibility*, 35 LA. L. REV. 420 (1974).

98. The court cited *Halls v. Cartwright*, 18 La. Ann. 414 (1866), *Meyer v. Howard*, 136 So. 2d 805 (La. App. 4th Cir. 1962) and other cases for these propositions.

99. In this particular case, unlike *Aucoin*, the attorney had pleaded quantum meruit as an alternative cause of action. The trial court, while rejecting the 10% contingency fee under the contract (which would have yielded a fee of some $72,000), awarded $25,000 on the quantum meruit claim. The appellate court reduced that amount to $12,000, but the supreme court reinstated the original award.

seems correct, particularly in view of the fact that an attorney's fee in such circumstances is an obligation of the husband as head and master of the community, payable on a quantum meruit basis whether reconciliation or dissolution is the final outcome of the litigation.[100] Thus there is no reason, as noted by the court in *Butler* and reiterated by the court in *Aucoin*, to assert the usual justification for a contingent fee arrangement that it allows one who could not otherwise afford counsel to procure adequate representation.

100. *See, e.g.*, Barranger, Barranger & Jones v. Farmer, 289 So. 2d 295 (La. App. 1st Cir. 1973) and the cases cited therein.